

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**WILMER B. GAY, *pro se***

**CIVIL ACTION**

**v.**

**CITY OF PHILADELPHIA; ARLEN  
SPECTER; THOMAS D. WATKINS; GAETAN:  
J. ALFANO; LYNNE M. ABRAHAM  
CATHERINE L. MARSHALL; ELIZABETH  
J. CHAMBERS; JOSEPH CLEARY;  
WILLIAM O'BRIEN; GEORGE J. IVINS;  
JOSEPH A. MURRY; CHARLES P.  
MIRARCHI; EDWARD J. BLAKE; JOHN J.  
POSERINA; WILLIAM J. MANFREDI;  
ZYGOMONT A. PINES; HOWARD HOLMES;  
JOHN W. PERSON; DAVID A. SZEWCZAK;  
C.R. HOSTUTLE; JOSEPH H. EVERS;  
ALBERTA COPELAND; RUSSEL M. NIGRO;  
JOSEPH A. DEL SOLE; JAMES GARDEN  
COLINS; MIKE D. FISHER; FRANCIS R.  
FILIPI; DALINDA E. CARREOR; PATRICK J.:  
MCMONAGLE; SUSAN J. FORNEY;  
JEFFREY A. BEARD; SARAH B.  
VANDENBRAAK; THOMAS JAMES;  
KENNETH D. KYLER; DIANA G. BANEY;  
PAUL WEAVERLING; DONALD ELLIOTT;  
WILT; STEELE; HAROLD L. RANDOLPH;  
ROBERT B. MOZENTER; JOEL P.  
TRIGIANI; ROBERT P. WILLIAMS**

**NO. 03-CV-5358**

**Defendants**

**Norma L. Shapiro, S.J.**

**August 2<sup>ND</sup>, 2005**

**MEMORANDUM AND ORDER**

Plaintiff Wilmer Gay, *pro se*, is a prisoner at the State Correctional Institution at Huntingdon ("SCI Huntingdon"). Plaintiff has filed a complaint, an amended complaint and a

second amended complaint alleging civil rights violations against 43 defendants under 42 U.S.C. §§ 1983, 1985(2), 1986, and 1988.

Plaintiff was convicted in April, 1972 of first degree murder in the Philadelphia County Court of Common Pleas. He was sentenced to life imprisonment and this conviction has been upheld upon numerous challenges.<sup>1</sup>

Plaintiff's first count alleges that Pennsylvania's "criminal process for returning true bill of indictments at Commonwealth v. Gay, 61 Pa. D. & C.2d 414 (C.P. Ct. Phila. County 1972) has been used to deprive plaintiff of due process and state courts have willfully denied Plaintiff an evidentiary hearing on those claims."

Plaintiff's second count alleges that there was a "continuing conspiracy" to obstruct justice and deny plaintiff access to various courts to redress Post Conviction Relief Act ("PCRA") grievances in Commonwealth v. Gay, 61 Pa. D. & C.2d 414.

Plaintiff's third count alleges a judicial conspiracy to deny plaintiff access to the court system in order to redress civil grievances in Gay v. Pines, 835 A.2d 402 (Pa. Commw. 2003)

Plaintiff's fourth and fifth counts allege a conspiracy to deprive plaintiff access to legal materials necessary to prove his claim for PCRA relief.

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<sup>1</sup> Plaintiff pursued a direct appeal to state court (Commonwealth v. Gay, 330 A.2d 843 (Pa. 1975)); attacked his sentence in state court in post-conviction hearings (Commonwealth v. Gay, 413 A.2d 675 (Pa. 1980)); filed four petitions for federal *habeas corpus* relief (Gay v. Dragovich, No. 97-2614 (E.D. Pa. March 10, 1998); Gay v. Petsock, No. 88-4433, 1990 WL 26683 (E.D. Pa. March 12, 1990); Gay v. Fulcomber, No. 85-0985, 1985 U.S. Dist. LEXIS 17319 (E.D. Pa. July 31, 1985); In re Gay, 510 U.S. 1108 (1994)); and filed several civil rights actions (e.g. Gay v. Lehman, et al., No. 83-2089, 579 F. Supp. 1019 (E.D. Pa. 1984), aff'd, 770 F.2d 1069 (3d Cir. 1985); Gay v. Elizabeth Chambers, et al., No. 89-0586, 1989 WL 14071, at \*1 (E.D. Pa. Feb. 17, 1989); Gay v. Watkins, 573 F. Supp. 706 (E.D. Pa. 1983)).

Plaintiff's sixth count alleges the defendants committed "Malfeasance in Office."

Plaintiff's seventh count alleges officials at SCI Huntingdon conspired to deny plaintiff court access by interfering with his access to "core legal materials."

Plaintiff's eighth count alleges defendant City of Philadelphia, through custom and practice, allowed state officials to deprive plaintiff of his constitutional rights.

Plaintiff's ninth count asserts general claims under 42 U.S.C. §§ 1983, 1985(2) and 1986.

Defendants have filed joint Motions to Dismiss under Fed. R. Civ. P. 12(b)(6).

## **DISCUSSION**

### **Standard of Review**

On consideration of a motion to dismiss for failure to state a claim upon which relief can be granted, the court evaluates the legal sufficiency of the complaint. Great West Life Assur. Co. v. Leviathan, 834 F. Supp. 858, 861 (E.D. Pa. 1993). The court accepts as true all factual allegations in the complaint, draws all reasonable inferences from them, and views them in the light most favorable to plaintiff. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989). The court need not credit legal conclusions, but must determine if the plaintiff can prevail under the law. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). It is "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

All constitutional claims are brought under 42 U.S.C. § 1983.<sup>1</sup> To recover under § 1983, plaintiff must establish: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981). A § 1983 action may be brought to enjoin the conduct complained of and/or for monetary damages; this right of recovery extends to prisoners. Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

Congress did not provide a federal statute of limitations for § 1983 claims. See 42 U.S.C. § 1983; Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989). The Supreme Court has held that because claims under § 1983 are, in essence, claims for personal injury, the several states' statutes of limitations applicable to personal injury claims control actions under § 1983. Wilson v. Garcia, 471 U.S. 261, 276 (1981). Pennsylvania's statute of limitations for personal injury claims is two years. 42 Pa. Cons. Stat. Ann. § 5524. The statute of limitations for § 1983 claims filed in Pennsylvania federal courts is two years. Bougher, 882 F.2d at 78. Claims arising before this are barred. Id. at 79.

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<sup>1</sup> 42 U.S.C § 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

### **Claims Arising Prior to October 3, 2001**

Plaintiff filed his original complaint on October 3, 2003. The following claims arise before October 3, 2001 and are barred.

Plaintiff alleges defendants Officer Joseph Cleary and Officer William O'Brien arrested plaintiff on April 25, 1971 without a valid warrant or probable cause. Plaintiff asserts that he was arrested because of "racial and class-based invidious discriminatory animus." Plaintiff alleges defendant Judge Joseph A. Murry (" Judge Murry") knew or should have known that the criminal complaints did not have supporting affidavits, a valid arrest warrant was not obtained, the court lacked subject-matter jurisdiction and plaintiff was being held in jail during trial on falsely accused charges. Plaintiff claims Judge Murry failed to notify plaintiff of his right to challenge the grand jury under Pa. Crim. P. 203.

Plaintiff alleges defendant Judge George Ivins ("Judge Ivins"), defendant District Attorney Arlen Specter ("Specter"), and defendant Assistant District Attorney Thomas Watkins ("Watkins") perpetuated a conspiracy for the purpose of obstructing plaintiff's right to due process and convicted plaintiff of crimes they knew he did not commit ("the conspiracy").

Plaintiff alleges defendant Harold L. Randolph ("Randolph"), represented plaintiff during the preliminary hearing and trial and joined the conspiracy when he failed to file a motion to dismiss the false charges. Plaintiff asserts Randolph knew or should have known there was no subject-matter jurisdiction, no supporting affidavits, and no valid warrant.

Plaintiff alleges the Superior Court and Supreme Court of Pennsylvania judges assigned to Commonwealth v. Gay, 61 Pa. D. & C.2d 414, arbitrarily denied plaintiff relief on direct appeal to further the conspiracy.

Plaintiff alleges counsel for two of his PCRA petitions, defendants Robert B. Mozenter (“Mozenter”) and Joel P. Trigiani (“Trigiani”), were ineffective and perpetuated the conspiracy against him by not producing exculpatory evidence. Plaintiff alleges on July 1, 1981 defendant Judge Edward J. Blake (“Judge Blake”) could not rule impartially and improperly refused to recuse himself from the second PCRA hearing. Plaintiff alleges the judges in both hearings, Judge Blake and Judge Charles P. Mirarchi (“Judge Mirarchi”), as well as District Attorney Gaetan J. Alfano (“Alfano”), joined the conspiracy when they “sat idly by” and watched the ineffective assistance of counsel.

Plaintiff alleges the Superior Court’s 1984 and 1986 *per curiam* orders, denying plaintiff’s motions in PCRA proceedings, were unconstitutional because they did not have a proper factual or legal foundation, nor a proper signature as required by Pa. R. A. P. 2521. These orders “arbitrarily and discriminatorily” denied plaintiff access to Superior Court. Plaintiff also alleges his PCRA petition was “arbitrarily and discriminatorily” denied by the Pennsylvania Supreme Court.

Plaintiff asserts defendant Assistant District Attorney Elizabeth J. Chambers (“Chambers”) filed fraudulent documents not in compliance with 19 Pa. Cons. Stat. § 241 as a true bill of indictment in Gay v. Petsock, 530 Pa. 182 (1992).

Plaintiff alleges prison officials at SCI Pittsburgh transferred plaintiff from SCI Pittsburgh to SCI Greene in retaliation for engaging in constitutionally protected speech as part of Gay v. Reid, No. 82-1978, 1988 U.S. Dist. LEXIS 12255 (E.D. Pa. Nov. 2, 1988).

Plaintiff alleges Lynne M. Abraham (“Abraham”), together with Deputy Commissioner

Laurence J. Reid and inmate Fred Chapman,<sup>1</sup> injured plaintiff when they conspired to wash plaintiff's socks in "sodium hydroxide [sic]" in retaliation for engaging in protected speech in Gay v. Reid, No. 82-1978.

Plaintiff alleges he filed a complaint in response to the washing of his socks in "sodium hydroxide [sic]," and Abraham conspired with Greene County Clerk Shirley Stockdale ("Stockdale") and Special Court Administrator Vincent J. Cirilli ("Cirilli")<sup>2</sup> when they failed to assign a docket number to plaintiff's complaint or appeal in an effort to conceal the washing of plaintiff's socks in "sodium hydroxide [sic]."

Plaintiff alleges he filed a *habeas* petition in state court, Gay v. Dragovich, No. 97-2614. Plaintiff asserts that defendant Deputy Attorney General Francis R. Filipi ("Filipi") notified the prothonary that no formal answer would be filed to plaintiff's petition. Plaintiff alleges defendant John W. Person ("Person") filed a fraudulent document asserting that no response was necessary on behalf of defendant Abraham and this was evidence of his participation in the conspiracy.

Plaintiff alleges in 1996, the Pennsylvania Supreme Court issued a fraudulent order denying his "Application for Reargument of False and Fraudulent Per Curiam Order." Plaintiff alleges this *per curiam* order did not have a legal or factual foundation or a proper signature. Plaintiff alleges the events since the *habeas* petition filing show a "meeting of the minds" between defendants Abraham, Filipi, and Person to deprive plaintiff of access to the Pennsylvania Supreme Court and to deny plaintiff equal protection of the law.

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<sup>1</sup>Chapman and Reid are not named defendants.

<sup>2</sup>Stockdale and Cirilli are not named defendants.

Plaintiff alleges the Court of Appeals for the Third Circuit denied his fourth *habeas* petition, Gay v. Dragovich, No. 97-2614, without factual or legal foundation.

Plaintiff alleges defendant Deputy Attorney General Dalinda E. Carrero (“Carrero”) and defendant Attorney General Mike Fisher (“Fisher”) refused to investigate plaintiff’s October, 2000 allegations of violations by prison officials in violation of their mandatory duties under the Sixth amendment and 71 Pa. Cons. Stat. § 761.

Plaintiff claims his transfer on March 21, 2001 from SCI Mahanoy to SCI Huntingdon was an act of retaliation for filing Gay v. Shannon, No. 02-4693, 2005 WL 756731, and engaging in constitutionally protected speech.

Plaintiff alleges defendant Judge John J. Poserina (“Judge Poserina”) “arbitrarily and summarily” dismissed plaintiff’s request for PCRA relief in June, 2001. Plaintiff also alleges defendant Philadelphia Court of Common Pleas clerk Alberta Copeland (“Copeland”) maliciously held Judge Poserina’s order for twenty days before mailing it to plaintiff. Plaintiff alleges Copeland also delayed filing plaintiff’s “Notice of Appeal” for twelve days as her part of the conspiracy.

Plaintiff alleges Fisher failed to train and discipline his subordinates and that doing so would have prevented plaintiff’s false imprisonment and the subsequent conspiracy to keep plaintiff imprisoned.

Plaintiff’s claims against the following defendants will be dismissed because all allegations against them are barred by the statute of limitations: Specter, Alfano, Abraham, Chambers, Fisher, Cleary, O’Brien, Judge Colins, Judge Ivins, Judge Murry, Judge Mirarchi,



Judge Blake, Hostutle, Carreor, McMonagle, Forney, Randolph, Mozenter, Szewczak, and Trigiani.

### **Claims Arising Subsequent to October 3, 2001**

#### **A. Plaintiff's Allegations Regarding His Legal Materials**

Plaintiff alleges defendants Watkins, Assistant District Attorney Catherine L. Marshall, Judge John J. Poserina, Judge William J. Manfredi, Judge Russell M. Nigro, Judge Joseph A. Del Sole, court administrator Zygmunt A. Pines, court administrator Howard Holmes, prothonary John W. Person, prothonary John H. Evers, court clerk Alberta Copeland, Deputy Attorney General Francis R. Filipi, CO1 Steele ("Steele"), Secretary of Corrections Jeffrey A. Beard ("Beard"), PDOC counsel Sarah B. Vandenbraak, PDOC grievance coordinator Thomas L. James, SCI Huntingdon superintendent Kenneth D. Kyler, SCI Huntingdon grievance coordinator Diana G. Baney, SCI Huntingdon major of guards Paul Weaverling, SCI Huntingdon unit manager Donald Elliott ("Elliott"), SGT. Wilt ("Wilt"), and trial counsel Robert P. Williams, engaged in a conspiracy to deprive plaintiff access to his legal materials in violation of his due process rights.

Plaintiff alleges that on several occasions defendants Wilt, Elliott, and Steele threatened to confiscate any legal materials encompassing more than a footlocker and two record boxes.

Plaintiff also alleges Steele threatened to destroy his legal materials. Plaintiff alleges he was first ordered to remove his excess legal materials in October, 2001; unnamed prison officials then removed a portion of plaintiff's legal materials from his cell in August, 2002. Plaintiff alleges he was threatened and his legal materials were confiscated in retaliation for plaintiff's testimony in Sims v. Dragovich, No. 95-6753, 1999 U.S. Dist. LEXIS 10422, (E.D. Pa. July 12, 1999).

Plaintiff's allegations that Steele, Wilt, Elliott threatened to confiscate or destroy his legal materials, and unnamed prison officials confiscated them, in retaliation for his testimony in Sims survive defendants' Motion to Dismiss if: (1) the conduct which led to the alleged retaliation was constitutionally protected, (2) defendants took adverse action against the plaintiff, and (3) plaintiff's constitutionally protected activity was the cause of the defendant's action. Rausser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001); Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997). Plaintiff had a constitutional right to testify in Sims v. Dragonvich, No. 95-6753. This court has previously held that absent a legitimate penological interest to the contrary, a prisoner has a constitutional right to testify as a non-party witness. Gay v. Shannon, No. 02-4693. This court has also previously examined whether plaintiff may keep all of his legal materials in his cell in Gay v. Shannon, No. 02-4693, and we upheld these prison regulations as reasonably limiting the time, place and manner in which inmates engage in legal research and preparation. See Gittlemacker v. Prasse, 428 F.2d 1, 7 (3d Cir. 1970). Plaintiff's allegations he was unable to keep all his legal materials in his cell do not charge a violation of a constitutionally protected liberty or property interest because plaintiff does not allege he could not access his legal materials, nor does he allege that any disciplinary action was taken against him. Removing his legal materials was enforcement of reasonable prison regulations, not adverse action. Allegations that defendants Wilt, Elliott, and Steele threatened to confiscate or destroy his legal materials, without more, fail to state a cause of action because plaintiff suffered no adverse action. See Hill v. Chalanor, 128 Fed.Appx. 187, 189 (2d Cir. 2005) (alleged threats made by prison guard defendant, "without any allegation that the latter carried through on those threats, did not constitute adverse action." Gill v. Pidlypchak, 389 F.3d 379, 383 (2d Cir. 2004) (prisoner

must allege some sort of actual harm in a First Amendment retaliation claim); Maclean v. Secor, 876 F. Supp. 695, 698 (E.D. Pa. 1995) (“[i]t is well-established that verbal abuse or threats alone do not state a constitutional claim”) (citations omitted); Prisoners’ Legal Ass’n v. Roberson, 822 F. Supp. 185, 189 (D.N.J. 1993) (“[V]erbal harassment does not give rise to constitutional violation enforceable under § 1983.”). Plaintiff’s claims against Wilt, Elliott, and Steele will be dismissed.

Plaintiff alleges he wrote a number of letters and filed a series of grievances in response to removal of his legal materials. Plaintiff alleges he also filed several legal actions against the individuals who participated in removal of his legal materials. Plaintiff asserts the consistent negative responses he received in response to his letters and grievances, and the lack of success on his claims, demonstrates that the persons involved, including the judges, counsel, court officials and prison employees, conspired to deny him access to his legal materials in violation of his Fourteenth Amendment right to due process.

**Plaintiff alleges Judge Poserina, Judge Manfredi, Judge Nigro, and Judge Del Sole** demonstrated their participation in the conspiracy to deprive plaintiff of his due process rights when they denied plaintiff’s legal motions and also when they did nothing after receiving letters in which plaintiff outlined his allegations against various members of the legal and prison systems.

Judges are absolute immune from § 1983 liability for “acts committed within their judicial jurisdiction.” Pierson v. Ray, 386 U.S. 547, 554-55 (1967). Plaintiff has failed to allege Judge Poserina, Judge Manfredi, Judge Nigro, or Judge Del Sole acted outside their judicial jurisdiction. Plaintiff’s claims against Judge Poserina, Judge Manfredi, Judge Nigro, and Judge Del Sole will be dismissed.

Plaintiff alleges Assistant District Attorney Marshall and Deputy Attorney General Filipi demonstrated their participation in the conspiracy when they declined to react after receiving plaintiff's letters outlining his allegations against various members of the legal and prison systems.

Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to absolute immunity. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993). Plaintiff has failed to allege Marshall or Filipi acted outside their roles and advocates for the state and they are entitled to absolute immunity as prosecutors. Plaintiff's claims against Marshall and Filipi will be dismissed.

To state a *prima facie* conspiracy claim under § 1983, plaintiff must allege: (1) defendants deprived him of a right secured by the Constitution or laws of the United States, Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); (2) defendants conspired to do so while acting under color of state law; Id., and (3) specific facts establishing a combination, agreement, or understanding among all or between any of the defendants to plot, plan or conspire to carry out the alleged chain of events. Panayotides v. Rabenold, 35 F. Supp. 2d 411, 419 (E.D. Pa. 1999); see also, Anderson 125 F.3d at 161; Rauser, 241 F.3d at 333. Mere suspicion or speculation are not sufficient to state a conspiracy claim. See Young v. Kann, 926 F.2d 1396, 1405 (3d Cir. 1991).

A violation of due process claim under the Fourteenth Amendment requires a plaintiff show: (1) a constitutionally protected liberty or property interest; and (2) constitutionally deficient

procedures by the state in its deprivation of that interest. Board of Regents v. Roth, 408 U.S. 564 (1972).

Plaintiff fails to show the procedures denying his grievances were constitutionally deficient. An alleged failure to respond or react favorably to an inmate grievance is not a due process violation. Rauso v. Vaughn, No. 96-6977, 2000 U.S. Dist. LEXIS 9035, \*59 (E.D. Pa. June 6, 2000).

Plaintiff has failed to allege a Fourteenth Amendment due process violation.

Plaintiff's conspiracy allegations also fail because he fails to allege any agreement or understanding among or between any of the defendants to plot, plan or conspire to violate his constitutional rights. Plaintiff's conspiracy allegations against Watkins, Catherine L. Marshall, Zygmunt A. Pines, Howard Holmes, John W. Person, John H. Evers, Alberta Copeland, Sarah B. Vandenbraak, Thomas L. James, Kenneth D. Kyler, Diana G. Baney, Paul Weaverling, and Robert P. Williams.

#### **B. Plaintiff's Monell Claim Against Defendant City and Beard**

Plaintiff alleges defendant City of Philadelphia ("City") "as a matter of police [sic] and practice has intentionally and deliberately failed to adequately discipline, train, or otherwise direct" police officers, assistant district attorneys, and the other defendants, and has failed to investigate the defendants' violations of the constitution and the law over the past 33 years. Plaintiff also alleges defendant City failed to establish adequate "state procedures" in violation of the Fourteenth Amendment. The Court deems this a Monell claim against City.

Plaintiff may state a § 1983 claim against a municipality when there is evidence the government entity creates or allows a custom or policy that violates the injured party's constitutional rights.

Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990) (citing Monell v. N.Y. City Dep't of Soc. Services, 436 U.S. 658 (1978)).

Monell claims are subject to a two-year statute of limitations.<sup>1</sup> Plaintiff has failed to allege any constitutional violation for which City could be liable not barred by the two-year statute of limitations.<sup>2</sup> Plaintiff's claim against City will be dismissed.

Plaintiff alleges Jeffrey A. Beard, Secretary of Corrections, approved and maintained the regulations which unconstitutionally limited the amount of legal material in plaintiff's cell.

Plaintiff also alleges Beard failed to discipline his subordinate officers when they enforced the "unconstitutional" regulations.

Plaintiff may state a § 1983 claim against a government official if that official's acts represent official policy. Bielevicz v. Dubinon, 915 F.2d at 850. However, plaintiff must allege the government official had "personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of *respondeat superior*. . . . Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence . . . ."

Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988).

Plaintiff's allegation Beard approved the prison regulations reasonably limiting plaintiff's legal materials fails to allege the violation of a constitutional right. Plaintiff also fails to allege Beard

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<sup>1</sup> The Court of Appeals for the Third Circuit has not decided if the continuing violation theory could result in Monell liability. See Mancini v. Lester, 630 F.2d 990 (3d Cir. 1980)(continuing violation argument advanced, but decided on other grounds). However, to assert a continuing violation theory in a § 1983 action, plaintiff must allege at least one violation that is not barred by the statute of limitations. Young v. City of Allentown, 882 F. Supp 1490, 1496 (E.D. Pa. 1995).

<sup>2</sup> Plaintiff does not allege City customs or policies caused Steele to threaten him.

had any personal knowledge or acquiesced in Steele's alleged threats. Plaintiff's claims against Beard will be dismissed.

### **C. Plaintiff's Claims Under 42 U.S.C. § 1985(2)**

Plaintiff's claims under § 1985(2) will be dismissed because plaintiff has failed to plead any viable conspiracy claim. See Moles v. Griffy, 2001 WL 1152984, at \*4 (plaintiff's inability to sustain claim under [S]ection 1983 necessarily causes his [S]ection 1985 conspiracy claim grounded in same underlying action to fail as well); Caldeira v. County of Kauai, 866 F.2d 1175, 1182 (9th Cir. 1989) ("[T]he absence of a [S]ection 1983 deprivation of rights precludes a [S]ection 1985 conspiracy claim predicated on the same allegations.")

### **D. Plaintiff's Claims Under 42 U.S.C. § 1986**

Plaintiff's § 1986 claim will be dismissed. § 1986 provides a cause of action against anyone who, having knowledge that any of the wrongs in § 1985 are about to be committed, "and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do." 42 U.S.C. § 1986. Plaintiff has failed to allege any wrongs under § 1985, so his § 1986 claim will be dismissed.

### **E. Plaintiff's Claims Under 42 U.S.C. § 1988**

The Civil Rights Attorney's Fees Awards Act, § 1988, authorizes the award of reasonable attorney's fees in a successful action brought to enforce a § 1983 action, but plaintiff has not succeeded in this action and *pro se* litigants are not entitled to attorney's fees. Kay v. Ehrler, 499

U.S. 432, 435 (1991). Plaintiff's *pro se* claim for attorneys' fees is not valid and will be dismissed. An appropriate order follows.



**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>WILMER B. GAY, <i>pro se</i></b>	<b>:</b>	<b>CIVIL ACTION</b>
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	
<b>CITY OF PHILADELPHIA; ARLEN</b>	<b>:</b>	<b>NO. 03-CV-5358</b>
<b>SPECTER; THOMAS D. WATKINS; GAETAN</b>	<b>:</b>	
<b>J. ALFANO; LYNEE M. ABRAHAM;</b>	<b>:</b>	
<b>CATHERINE L. MARSHALL; ELIZABETH</b>	<b>:</b>	
<b>J. CHAMBERS; JOSEPH CLEARY;</b>	<b>:</b>	
<b>WILLIAM; O'BRIEN; GEORGE J. IVINS;</b>	<b>:</b>	
<b>JOSEPH A. MURRY; CHARLES P.</b>	<b>:</b>	
<b>MIRARCHI; EDWARD J. BLAKE; JOHN J.</b>	<b>:</b>	
<b>POSERINA; WILLIAM J. MANFREDI;</b>	<b>:</b>	
<b>ZYGMONT A. PINES; HOWARD HOLMES;</b>	<b>:</b>	
<b>JOHN W. PERSON; DAVID A. SZEWCZAK;</b>	<b>:</b>	
<b>C.R. HOSTUTLE; JOSEPH H. EVERS;</b>	<b>:</b>	
<b>ALBERTA COPELAND; RUSSEL M. NIGRO;</b>	<b>:</b>	
<b>JOSEPH A. DEL SOLE; JAMES GARDEN</b>	<b>:</b>	

**COLINS; MIKE D. FISHER; FRANCIS R. :**  
**FILIPPI; DALINDA E. CARREON; PATRICK J.:**  
**MCMONAGLE; SUSAN J. FORNEY; :**  
**JEFFREY A. BEARD; SARAH B. :**  
**VANDENBROOK HART; THOMAS JAMES; :**  
**KENNETH D. KYLER; DIANA G. BANEY; :**  
**PAUL WEAVERLING; DONALD ELLIOTT; :**  
**WILT; STEELE; HAROLD L. RANDOLPH; :**  
**ROBERT B. MOZENTER; JOEL P. :**  
**TRIGIANI; ROBERT P. WILLIAMS :**

**Defendants**

**Norma L. Shapiro, S.J.**

**August 2<sup>nd</sup>, 2005**

**ORDER**

AND NOW, this 2<sup>nd</sup> day of August 2005, upon consideration of defendants' Motions to Dismiss (Papers # 63, 64, 66, 68, 70, 71) and responses thereto (Paper #69, 72, 75, 76), it is

hereby **ORDERED** that defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) is

**GRANTED:**

1. Claims against the following defendants are **DISMISSED** because the two-year statute of limitations has run on plaintiff's claims against these defendants: Arlen Specter, Gaetan J. Alfano, Lynne M. Abraham, Elizabeth Chambers, Mike. D. Fisher, Joseph Cleary, William O'Brien, Judge James G. Colins, Judge George J. Ivins, Judge Joseph A. Murry, Judge Charles P. Mirarchi, Judge Edward J. Blake, C.R. Hostutle, Dalinda E. Carreor, Patrick J. McMonagle, Susan J. Forney, Harold L. Randolph, Robert B. Mozenter, David A. Szewczak and Joel P. Trigiani.
2. Claims against the following defendants are **DISMISSED** for failure to state a claim upon which relief can be granted: Thomas Watkins, Zygmunt A. Pines, Howard Holmes, John W. Person, John H. Evers, Alberta Copeland, Jeffrey A. Beard, Sarah B. Vandenbraak, Thomas L. James, Kenneth D. Kyler, Diana G. Baney, Paul Weaverling, Donald Elliott, SGT. Wilt, Steele, Robert P. Williams, and City of Philadelphia.
3. Claims against the following defendants are **DISMISSED** because they are entitled to absolute immunity as judges Judge John J. Poserina, Judge William J. Manfredi, Judge Russel M. Nigro, and Judge Joseph A. Del Sole.
4. Claims against Catherine L. Marshall and Francis R. Filipi are **DISMISSED** because they are entitled to absolute immunity as prosecutors.
5. Plaintiff's Motion to Compel Discovery (Paper # 77, 98) is **DENIED** as moot.

6. Plaintiff's Motions to Serve One Copy of Request for Discovery (Paper # 78, 79) are **DENIED AS MOOT**.
7. Defendants' Motions to Stay Discovery (Paper # 81, 100, 101) are **DENIED AS MOOT**.
8. It appearing that in plaintiff's reply to defendant's response to plaintiff's motion for reconsideration (Paper # 102) plaintiff has made a Motion for Joinder, the clerk of the court is directed to amend the docket to reflect that Paper # 102 is plaintiff's Motion for Joinder of Attorney General Thomas W. Corbett, Jr.
9. Plaintiff's Motion for Joinder of Attorney General Thomas W. Corbett, Jr. (Paper # 102) is **DENIED** because Corbett is entitled to absolute immunity as a prosecutor. See Imbler v. Pachtman, 424 U.S. 409 (1976).
10. The Clerk of Court is directed to mark this case as closed.

/s/ Norma Shapiro

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Norma L. Shapiro, S.J.